Proceeding: Missouri Petition for Preemption of Section 392-410(7) of the Revised Statues o Record 1 of 1
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
The Missouri Municipal League;	)	
The Missouri Association of Municipal Utilities;	)	
City Utilities of Springfield;	)	**CC Docket No. 98-122**
City of Columbia Water & Light;	)	
City of Sikeston Board of Utilities	)	
	)	
Petition for Preemption of	)	
Section 392.410(7) of the	)	
Revised Statutues of Missouri	)	

REPLY COMMENTS OF UTC, THE TELECOMMUNICATIONS ASSOCIATION

Pursuant to Section 1.415 of the Commission's Rules, UTC, The Telecommunications Association (UTC),[1] hereby respectfully submits the following reply comments in support of the above -captioned "petition for preemption" filed by the Missouri Municipals on July 8, 1998.

I. Introduction

As the national representative on telecommunications matters for the nation's electric, gas and water utilities, and natural gas pipelines, UTC filed comments urging the FCC to promptly issue a ruling that Section 392.410(7) of the Revised Statutes of Missouri acts as an impermissible barrier to entry into telecommunications by municipal utilities, or others who would seek to provide telecommunications service using municipal utility infrastructure. Preemption is necessary to effectuate the underlying intent of Congress to promote competition to all consumers by allowing "all providers to enter all markets." In its initial comments UTC demonstrated that preemption is warranted under either a traditional preemption analysis or under the *Ashcroft* "plain statement" standard of review. Below UTC reiterates this request in

the context of responding to the comments filed by other parties in this proceeding.

II. Section 392.410(7) Is An Impermissible Barrier To Entry

In its petition the Missouri Municipals, on behalf of more than 600 municipalities and 63 municipal electric utilities located in Missouri, have requested the FCC to exercise its preemption authority contained in Section 253 of the Telecommunications Act and overturn Section 392.410(7) of the Revised Statutes of Missouri as constituting an illegal "barrier to entry." Section 392.410(7) prohibits Missouri municipalities and municipal electric utilities from either providing telecommunications services themselves, or providing telecommunications infrastructure to other persons for use in competing against the incumbent telecommunications carrier.

A. The FCC Has Not Yet Ruled On The Application Of Section 253 To Municipally-Owned Electric Utilities

The National Telephone Cooperative Association (NTCA) and GTE suggest that the FCC has already decided that Section 253(a) of the Telecommunications Act is inapplicable to state laws such as Missouri's that prohibit municipalities and municipal-owned electric utilities from engaging in the provision of telecommunications services or facilities. The basis for NTCA's and GTE's argument is that in 1997 the Commission declined to preempt a similar state law in Texas barring municipal and municipal utility provision of telecommunications.[2]

NTCA's and GTE's reliance on the *Texas Order* is misplaced. The *Texas Order* involved a review of Section 3.251(d) of the Texas Public Utility Regulatory Act of 1995, which prohibits Texas municipalities and municipal electric utilities from providing telecommunications services directly or indirectly. However, the FCC never ruled on the application of its preemption

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[1] UTC was formerly known as the Utilities Telecommunications Council.

2 *In the matter of the Public Utility Commission of Texas* , FCC 97-346, (rel. Oct. 1, 1997) ("*Texas Order*"), petition for review pending in *City of Abilene, TX, and the American Public Power Association v. Federal Communications*

authority to municipally-owned electric utilities. The origins of the *Texas Order* arose out of two separate Section 253 petitions for preemption of PURA95's Section 3.251(d). The first petition was filed by IntelCom Group (USA), Inc. and ICG Access Services, Inc. (collectively "ICG"), a competitive local exchange carrier that wanted to utilize fiber optic capacity that it leased from the municipally-owned electric utility in San Antonio, Texas. The second petition was filed by the City of Abilene, Texas, a city which does not operate an electric utility but which decided to build its own, or contract with new competitive entrants to build, a telecommunications network. In August of 1997, ICG withdrew its petition and terminated its agreement with San Antonio's municipal electric utility and abandoned its plan to compete with Southwestern Bell in San Antonio. As a result, the Commission limited its holding in the *Texas Order* to the facts presented by the City of Abilene. Significantly, the FCC stated "we do not decide at this time whether section 253 bars the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility." *Texas Order*, ¶ 179.

Moreover, in the Commission's recent Brief in defense of its *Texas Order*,[3] the FCC conceded that the legislative history of Section 253 indicates Congressional intent to include utilities as being within the scope of the Act, but argued that these materials focus on the provision of telecommunications service by utilities and therefore were not pertinent to the specific facts raised by the City of Abilene in its court challenge. Now however, in the Missouri Municipal's preemption request, the FCC has the issue of the application of Section 253 to municipally-owned electric utilities squarely before it.

In addition, as the Missouri Municipals note in their petition, several developments reinforce the conclusion that the Commission should re-examine its analysis in the *Texas*

Commission, Case Nos. 97-1633 and -1634 (D.C. Cir).

3 FCC's Respondent's Brief filed on July 15, 1998, at pp. 12, 17-20, in the pending review of *City of Abilene v.*

decision itself. First, in *Bell Atlantic Telecommunications Cos. v. Federal Communications Commission*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) the Court concluded that in attempting to discern the plain meaning of a statute the FCC is obliged to evaluate all traditional indicia of Congressional intent. Under this standard the FCC is compelled to carefully review the language, legislative history, structure and purposes of the Telecommunications Act in order to determine the intent of Congress in drafting Section 253. In its brief in the *Abilene* case the FCC explicitly conceded that it did not analyze the legislative history of Section 253 when it ruled on Abilene's petition in its *Texas Order*.

Moreover, in its brief in the *Abilene* case the FCC maintained that the Court should not consider inconsistencies between its *Texas Order* and subsequent Commission decisions arguing that the "Commission can hardly be faulted for ignoring 'precedents' that did not precede" and that "it would appear more appropriate for the parties to later cases to contest the inconsistency" of previous cases. The Missouri Municipals' preemption petition presents just such an opportunity.

B. The FCC Needs To Examine Legislative History

As noted above, in *Bell Atlantic* the Court concluded the FCC is compelled to carefully review the language, legislative history, structure and purposes of the Telecommunications Act in order to determine the intent of Congress in drafting Section 253. As documented in the Missouri Municipals' preemption petition and in the supporting comments of UTC, the legislative history and underlying goals of the Telecommunications Act demonstrate that

Congress fully intended and expected that all utilities, including municipally-owned utilities would be able to participate in the provision of telecommunications. NTCA attempts to discredit

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FCC, Case Nos. 97-1633 and 97-1634 (D.C. Cir.).

the legislative history cited by the petitioners and UTC but provides absolutely no support for its arguments or evidence of contrary legislative intent. Moreover, as noted above, the FCC has conceded the accuracy of the legislative history reported by the Missouri Municipals and UTC. Based on this indicia of Congressional intent, the FCC should conclude that Section 253 was intended to be sufficiently broad in scope to encompass municipal utilities.

C. "Any Entity" Includes Municipal Utilities

As all parties agree, the ultimate question at issue is the intended breadth of the term "any entity." In *Alarm Industry Communications Council v. Federal Communications Comm'n*, 131 F.3d 1066 (D.C. Cir. 1997), the Court rejected an unduly restrictive Commission interpretation of the term "entity" in the context of a separate provision of the Telecommunications Act. Contrary to NTCA's assertion, the Court found that the term "entity" contained in Section 275 of the Act should ordinarily be given its broad, common meaning. *Alarm Industry*, 131 F.3d at 1069, unless the FCC is able to support a more narrow interpretation on the basis of an "assessment of statutory objectives," "weighing of Congressional policy" or "application of expertise in telecommunications." A similar analysis is required in the instant proceeding.

As the Missouri Municipals and the comments by UTC make clear, a thorough analysis of the legislative history of Section 253 and the policy objectives of the Act itself reveal that Congress intended that the Commission's preemption authority be given broad interpretation and application. There can be no doubt that the FCC recognizes the broad authority that 253 gives to the Commission to remove barriers to entry. In the *Texas Order* itself the FCC stated:

> [S]ection 253 expressly empowers -- indeed, obligates -- the Commission to remove any state or local legal mandate that "prohibit[s] or has the effect of prohibiting" a firm from providing any interstate or intrastate telecommunications service. *We believe that this provision commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from p*

roviding any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service.

Texas Order, ¶ 22 (emphasis added).

Attempts to impose a narrow construction on the scope of Section 253 are further undermined by Congressional use of the adjective "any" to modify the term "entity." The choice of the adjective "any" demonstrates that Congress intended that the term "entity" be given an expansive interpretation that would include both public and private entities. As UTC noted in its comments, the Supreme Court has held that "[u]se of the term 'any' in the statute...undercuts the attempt to impose [a] narrowing construction." *Salinas v. U.S.*, 118 S.Ct. 469 (1997).

D. Municipal And Municipal Utility Entry Into Telecommunications Is Not Anti-competitive

The Missouri Attorney General, GTE, NTCA and SBC all attempt to argue that Section 392.410(7) of the Revised Statutes of Missouri is necessary in order to avoid allowing Missouri municipalities to exercise monopoly control over local telecommunications. These arguments are thoroughly unconvincing. First of all, the Missouri Municipals are seeking to introduce competition into monopoly controlled environments. In many instances, GTE, NTCA and SBC are the very incumbents who are squelching choice, innovation and access to advanced telecommunications for small towns in Missouri. It is significant to note that only incumbents with *de facto* monopoly power have expressed concern over municipal entry and not new competitive entrants.[4] One would expect that the reverse would be the case if municipal participation was actually perceived as a threat to competition.

4 It is also important to recognize that the incumbents all have access to many of the same powers -- easements, eminent domain -- that that the Missouri Attorney General cites as evidence of the inherent advantages of municipally-owned utilities. The only difference is that Section 253 requires the municipalities to exercise these

Second, this line of argument, that regulators should not be allowed to compete against regulatees, is a red herring. It completely ignores the fact that municipal utilities do not have regulatory authority over telecommunications competitors. For example, and as the petition notes, the charter for the Board of Public Utilities of Springfield specifically prohibits the Board or its members from participating in the franchising, licensing or otherwise regulating non-public utilities. Moreover, in Missouri telecommunications service providers are regulated by the state's Public Service Commission -- not by municipalities.

Finally, this justification fails to consider that the FCC itself found in the *Texas Order* that considerations of the kind that the Attorney General, GTE and SBC cite in support of Section 392.410(7) of the Revised Statutes of Missouri could be addressed adequately through means that stop short of an outright prohibition on municipal telecommunications activities. Indeed, should a municipality attempt to tilt the playing field in its favor through discriminatory franchising fees or control over public rights-of-way they would themselves properly be the subject of a Section 253 preemption challenge.

It should also be noted that neither the Missouri Attorney General nor the commenting incumbents explain how a prohibition on the provision of telecommunications facilities by municipalities or municipal utilities is necessary to avoid anti-competitive conduct and provide a level playing field. The provision of telecommunications infrastructure to new competitive entrants does not raise anti-competitive issues and in many instances may be essential to "kick-start" competition and investment in rural communities. Indeed, in many areas of the country where competition is beginning to develop new entrants have been leasing municipal utility fiber.[5]

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powers on a non-discriminatory basis.

[5] Contrary to GTE's concern over the unfair advantage of "civic pride," most consumers are totally unaware of the

III. Conclusion

Section 392.410(7) of the Revised Statutes of Missouri is contrary to the national policy of advancing competition to all consumers that Congress envisioned in enacting the Telecommunications Act and should be preempted as an impermissible "barrier to entry." The Missouri law explicitly prohibits municipalities and municipal electric utilities from providing telecommunications services or facilities. In the *Texas Order*, the Commission essentially conceded that a similar prohibition contained in Texas law is contrary to the purposes of the Telecommunications Act and entreated other states not to do what Texas had done, finding that municipalities can bring "significant benefits" by accelerating facilities-based competition. Clearly the FCC's admonition is going unheeded and the incumbents have become emboldened to further restrain the development of true facilities-based competition.

Accordingly, the FCC should take decisive action to foster competition by declaring that municipalities generally, and municipal utilities specifically, are within the scope of the term "any entity" of Section 253 in the Telecommunications Act. Such an interpretation is consistent with the "plain meaning" of Section 253(a) as informed by the actual text of the statute, the overall goals of the Act and the relevant legislative history.

WHEREFORE, THE PREMISES CONSIDERED, UTC respectfully urges the Commission to take action on this "petition for preemption" in accordance with the views expressed in these reply comments.

Respectfully submitted,

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underlying ownership of telecommunications infrastructure that are being provided by a municipal utility to a third-party service provider.

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